SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 155

GEORGE M. BOURQUIN,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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† GEORGE M. BOURQUIN,
In pro per.

INDEX, PETITION

CITATIONS

Case:

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MAY IT PLEASE THE COURT:

The petitioner, George M. Bourquin, respectfully prays that a writ of certiorari issue to review the proceedings and judgment of the Court of Claims in the above entitled case pending therein.

Jurisdiction

The opinions not officially reported and the judgment therein were rendered and entered June 2, 1947, and jurisdiction of this Supreme Court is invoked by virtue of the provisions of § 3 (b) of Act of February 13, 1925, as amended (28 U. S. C. § 288(b)).

The Matter Involved

The petitioner is a Federal district judge who in 1934 in receipt of a salary of $10,000 per year, exercised the two privileges or options extended by the so-called retirement law (Act February 25, 1919, 28 U. S. C. § 375) viz: (1) to declare he "retired", and (2) to thereafter perform or refrain from regular active service on the bench if, when and to extent pleaseth him. He timely claimed the increased salary at the rate of $15,000 per year awarded to each district judge by the new salary law (Act July 31, 1946, Public Law 567), which was denied by government, therefore he brought the suit before mentioned in the Court of Claims. A general demurrer thereto was sustained upon the grounds alleged that the said "retirement" law "violated the Constitution in no way" and that "Act July 31, 1946, does not apply to retired judges"; and the action was dismissed by the judgment sought to be reviewed herein.

Statutes Involved

Act July 31, 1946, *supra*, provides that thereafter "the following salaries shall be paid to the several judges hereinafter mentioned, in lieu of the salaries now provided by law, namely: * * * to each of the judges of the several district courts * * * at the rate of $15,000 per year." No exception is expressed.

Act February 25, 1919, *supra*, provides (1) that any judge of a district court of the United States, qualified by age and service, may resign his office and "shall during the residue of his natural life, receive the salary which is payable at the time of his resignation," (a mere restatement of the pre-existing law); (2) that instead of resigning he "may retire upon the salary of which he is then in receipt, from regular active service on the bench, and the

President shall thereupon be authorized to appoint a successor"; and (3) that the so-called retired judge may be called upon to "perform such judicial duties" as he "may be willing to undertake."

Constitutional Reference

Article 3, § 1 of the Constitution provides that Federal judges "shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Errors Assigned

The Court of Claims erred, as follows:

1. In holding that Act July 31, 1946, Public Law 567, the new salary law, "does not apply to retired judges" and petitioner.

2. In resorting to construction of the plain, unambiguous, clear and unmistakable new salary law needing none, and therein giving consideration and weight to legislative history, and in imposing upon said law an implied exception of so-called retired judges and petitioner.

3. In holding Act February 25, 1919, 29 U. S. C. § 375, the so-called retirement law, is a "special reference" or "specific aspect" or consideration of the salaries of "retired" judges, "fixing the salaries" thereof, and operating as an implied exception of "retired" judges and petitioner from the grant of the new salary law.

4. In holding petitioner's exercise of the privileges or options of the so-called retirement law was an acceptance of an offer on condition therein "that he should continue to draw the salary he was receiving when he retired,"

despite the new salary law and its increase of salary of all district judges of whom petitioner is one.

5. In holding that Congress has power, and in the "retirement law exercised, to absolve judges of or from the duty to perform judicial service in the public interest imposed by Article 3, § 1 of the Constitution, and therein "violated the Constitution in no way."

6. In dismissing the action and entering judgment accordingly.

Questions Presented

1. Whether the new salary law applies to retired judges of whom petitioner is one; whether it is open to construction and legislative history to impose upon it an implied exception of "retired" judges and petitioner from it and the increase of salaries granted by it to all district judges.

2. Whether the so-called retirement law is "a special reference" or "specific aspect" or consideration of salaries of "retired" judges and "fixing" the same; whether exercise of the privileges or options of said law is acceptance of an offer on condition that "he should continue to draw the salary he was receiving when he retired" and restricting him thereto despite the subsequent new salary law and its increase of salary; whether it operates as an implied exception imposed on the new salary law to exclude "retired" judges and petitioner from the grant thereof; and whether the "retirement" law is of any *legal* effect save to conditionally authorize appointment of additional judges without permanent increase in the number thereof, and in all else futile, superfluous verbiage affecting the status and salary right of petitioner not at all.

3. Whether Congress has power to absolve a judge of or from his constitutional duty to perform judicial service

"for the benefit of the whole people", and whether by the "retirement" law it has done so in respect to "retired" judges.

4. Whether the dismissal of the petitioner's suit by the Court of Claims was error.

Reasons for the Writ

The scope of the new salary law, and the relation thereto and effect thereon, if any, by the so-called retirement law and Article 3, § 1 of the Constitution, present important questions of Federal law in controversy in the suit aforesaid which have not been but should be settled by the Supreme Court, it being the only constitutional court having jurisdiction thereof.

Moreover, the Court of Claims in contravention of the settled law of decisions by this Supreme Court, in name Legion, erroneously resorted to construction of the plain, unambiguous, clear and unmistakable new salary law needing none, erroneously resorted to legislative history and other rules, giving consideration and weight thereto, and in consequence imposed an implied exception where none is expressed, virtually rewrote said law, excluded petitioner from its all-inclusive scope and benefit, and adjudged he had no cause of action.

Therein, the court below so far departed from accepted and usual law and procedure that the whole calls for exercise of the Supreme Court's power of supervision to the end that the errors below be corrected, the law settled, and the judgment below reversed. Although not representative in form, the case involves the general interests of some thirty judges and also public interest and right to an independent judiciary. And it is less motivated by desire for monetary gain than by the duty that rests upon every

judge to withstand impairment of his salary right, in behalf of an "independent judicial administration for the benefit of the whole people".

O'Donoghue v. *U. S.*, 289 U. S. 533.

Prayer

WHEREFORE, petitioner prays the writ of certiorari be allowed and issue in due form, manner and time.

GEORGE M. BOURQUIN,
In pro per.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 155

GEORGE M. BOURQUIN,

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THE UNITED STATES

BRIEF FOR PETITIONER, CERTIORARI

MAY IT PLEASE THE COURT:

The opinions of the Court of Claims (R. 3) have not been reported.

Jurisdiction

Jurisdiction of this Court is invoked for that the matter and proceedings herein are within § 288(3), 28 U. S. C.

Statement

Petitioner is a Federal district judge who in 1934 exercised the two privileges or options extended by the so-called retirement law (28 U. S. C. § 375), viz: (1) to declare he "retired," and (2) thereafter to render or refrain from regular active service on the bench, if, when, and to extent

pleaseth him. His salary then $10,000 per year, by Act July 31, 1946 (Public Law 567), in common with those of "each of the judges of the several district courts," was increased to $15,000 per year. The government refused the increase and he brought suit in the Court of Claims, wherein defendant's demurrer was sustained on the grounds alleged that the "retirement" law is constitutional (R. 5) and that "retired" judges are not within the scope and benefit of said new salary law (R. 7). Judgment of dismissal was entered June 2, 1947 (R. 10). Hence, this petition to review and reverse said judgment.

Specification of Errors to Be Urged

1. Assigned errors 1 and 2, *supra*, p. 3, relate to the new salary law and will be urged and argued together. For brevity, their substance is (1) that the court erred in holding that the said law does not apply to retired judges; (2) that the court erred in resorting to construction of the plain, unambiguous, clear and unmistakable new salary law needing none, and in resorting to and giving consideration and weight to legislative history; and (3) that the court erred in holding the new salary law by implied exception excluded so-called "retired" judges and petitioner from its scope and benefit.

2. Assigned errors 3 and 4, *supra*, pp. 3-4, relate to the "retirement" law and will be urged and argued together. For brevity, their substance is (1) that the court erred in holding the "retirement" law is a special reference or specific aspect or consideration of salaries of "retired" judges and "fixing" the same, operating as an implied exception of said judges and petitioner from consideration at enactment of the new salary law and from its terms and grant; and (2) erred in holding petitioner's exercise of the privileges or options of the "retirement" law was acceptance

of an offer of congressional sanction of leisure, on condition that "he should continue to draw the salary he was receiving when he retired," restricting him thereto despite the new salary law.

3. Assigned error 5, *supra*, p. 4, relates to Article 3, § 1 of the Constitution, and in substance is that the court erred in holding Congress has power to absolve judges of or from the duty to render judicial service in the public interest, imposed by Article 3 aforesaid, exercised it in the "retirement" law, "and violated the Constitution in no way."

4. Assigned error 6, *supra*, p. 4, will be urged and argued that the court erred in sustaining the defense's demurrer and in entering judgment accordingly.

Summary of Argument

1

The new salary law expressly declares the increased salaries "shall be paid * * * to each of the judges of the several district courts". Petitioner is one of said judges. Said law needs no construction, and is invulnerable to legislative history—not to be consulted. No exception expressed, none is to be implied unless its proponent sustains the burden to convincingly demonstrate it by sufficient considerations of probative value. Not otherwise can the integrity of the legislative function and of statutory law be maintained.

2

The "retirement" law retires nothing. It is not a special reference or specific aspect or consideration of salaries of "retired" judges, and does not "fix" them. They were theretofore created or fixed by the old salary law, and their continuance and duration guaranteed by the Constitution.

Congress has no power over judge's salaries save to increase them, and the "retirement" law affects salaries not at all.

The only *legal* effect of said law is to conditionally provide for appointment of additional judges without permanent increase in their number. All else is futile surplusage.

"Public office is a public trust" and not an employment subject to contract, conditions, offer and acceptance, barter and trade. Congressional sanction of leisure is not a restrictive condition and offer accepted by exercise of the privileges or options of the "retirement" law. If it is, it is contra to Article 3, § 1 of the Constitution and public policy, and void.

The mere incidental reference to salary in the phrase "may retire upon the salary of which he is then in receipt" is but a precautionary, declaratory assurance that his salary will continue to be paid "without interval" and "immediately following" (Webster's definition of "on" and "upon" in like context). This was to dispel doubts in respect to the status and salary of a "retired" judge. Congress itself had doubts, and later conceiving he was like unto a resigned judge on a pension, reduced his salary, was therein upheld by the Justice Department, but annulled by this Court in *Booth's* case, 291 U. S. 351. His status, says the Court, "is the same as that of any active judge so called."

3

Article 3, § 1 of the Constitution imposes upon judges the duty of service co-extensive with the jurisdiction, authority and power of the court. In the public's interest and for its benefit, this duty cannot be absolved or barred by Congress nor ceded by the judge, nor between them bartered for congressional sanction of nonperformance.

By diminishing the jurisdiction of the court or by appointment of an additional judge his labor may be lessened but his duty not diminished.

Argument

The New Salary Law

By four corners taken, the new salary law in express, plain and unambiguous language of clear and unmistakable meaning, is a peremptory mandate that its increase of salaries "shall be paid to each of the judges of the several district courts." Both "retired" and nonretired judges are included in that category, and no more necessary to specifically name the one than the other. Had Congress intended any exception it easily could and would have said so. It needs no construction. Even as only the sick need a physician, only an ambiguous statute needs the remedy of construction. This is the cardinal of all rules. Legislative history is immaterial. Congress passes bills, not committee reports. The latter are the preliminary, transient, nebulous, tentative views of some few; the statute is the final, matured, deliberate will and judgment of the whole Congress and permanently enrolled in the book of laws. To illustrate, did the committee report say "the judges of Nevada and Idaho will not receive the proposed increase", would the court hold they were thus excluded from the all-inclusive new salary law? So, of "retired" judges, any committee report to the contrary notwithstanding.

The theretofore ambiguous status of a "retired" judge was settled in *Booth's* case, 291 U. S. 351, viz; "* * * the same as that of any active judge so called," and that the law contemplates he "shall continue so far as his age and health will permit, to perform judicial service"; and in his own district without let or hindrance, says *Maxwell's* case,

271 U. S. 674, in others, as before on assignment or call. A nonretired judge is not required to do more. The rule of no construction where none needed is necessary to maintain the integrity of the legislative function and of statutory law. The plain and clear text of the published statute, unaffected by "weasel words" discovered by prowling the legislative old lumber rooms, is the law. If on that the people cannot rely, they are in as hard case as those whose tyrant posted his edicts high above eyesight. But why labor the point? Every term it is declared and applied by this Court in decisions of name Legion of which the following are late and leading, viz.: *Packard Motor Co.* v. *Labor Board,* 330 U. S. —; *Utah Junk Co.* v. *Porter,* 328 U. S. 44; *Gemeses* v. *Walling,* 324 U. S. 260; *Barr* v. *U. S.,* 324 U. S. 83; *Osaka Line* v. *U. S.,* 300 U. S. 101; *Kuehner* v. *Bank,* 299 U. S. 449; *Helvering* v. *Bank,* 296 U. S. 89.

The written text prevails, not impaired by doubts and conjectures of needless construction.

This rule was ignored by the court below, and it gave much consideration and obvious weight to legislative history. It also ignored the significant fact, if that history is to be consulted, that a search of the Congressional Record discloses that during the entire consideration of the Senate bill which became the new salary law, in neither house was there a single expression, oral or written, by any member or committee that "retired" judges were not therein included. It also ignored that with exclusions in mind, the Senate bill and report expressly excluded the district judge of the Virgin Islands (later included on passage), demonstrating intent to include all others.

Expressio unius, etc.

Moreover, the legislative history to which the court below erroneously resorted, is not of the Senate bill which became the new salary law, but is of a like House bill which at no

time considered, read, debated or on passage in the House, was laid on the table *after* the House had passed the Senate bill—passed it not in "lieu" of its bill but in utter disregard of it and as an independent measure (92 Cong. Rec. 9697). House Bill 2181 introduced February 14, 1945 (91 Cong. Rec. 1107), report made October 29, 1945 (91 Cong. Rec. 10168), laid dormant until tabled as aforesaid July 20, 1946 (92 Cong. Rec. 9697).

The court below found there was "ample and good reason" (R. 5, 6) to exclude "retired" judges from the new salary law. That is a matter of personal opinion. There is ample and good reason to include them.

At the time of passage, every member knew the effect of the *Booth* and *Maxwell* cases, knew that judges of the privilege in no sense were retired but active, knew that most of them continued to render good service and some of them well-nigh as extensive as before, knew that all of them constitute a valuable reserve, a stand-by plant, to serve emergency, and knew they stood on a plane of equality with judges not privileged. In consequence, between the "retired" judge and the nonretired, between him of 20 years' service who "retired" yesterday and him of 10 years' service who "retired" the morrow, Congress saw no good reason to and did not differentiate. Equal in status, of like service in the same court, of like ethical restraint from active business and like statutory prohibition of practice of law, of like station of eminence, prestige, dignity, respect and honor to maintain, of like solicitude for offspring if only to confirm Solomon's wisdom that "A good man prepareth an inheritance for his grandchildren," in the judgment of Congress they were equal in merit and need, and that the increase of salary was as reasonable, necessary, appropriate and just for the one as for the other.

The policy of the era is to increase wages, salaries, subsidies, pensions and a variety of gratuitous allowances, to

cope with the rising tide of prices and costs which threatens disaster to the standard of living and the general welfare; and with this, the increase of salaries to judges of which plaintiff is one, is consistent and without any taint of absurdity.

It is emphasized that for more than 20 years the Judicial Code employs the comprehensive word "judge" to designate all judges in every respect of jurisdiction, duty, salary and all else. That thereby judges who have exercised the privileges or options are included is beyond question. Why then contend that for the very first time this long-honored all-inclusive word "judge," excludes judges of the privilege? To do so destroys legislative consistency and statutory harmony—"sweet bells jangled out of tune," and is without support in reason and principle.

The "Retirement" Law

It is a misnomer. It retires nothing.

Its object was additional judges, at a time when Congress was loath to permanently increase their number, by the device of pseudo retirement advanced by ex-president Taft and various members of the American Bar Association. And that is the only *legal* effect of the law. In all else it is futile surplusage. A qualified judge announces "I retire," whereupon another judge is appointed to share the work. Thereafter, the "retired" judge, whose status and all else is not a whit changed, may exercise the other privilege or option, by rendering or refraining from "regular active service on the bench," if, when, and to extent pleaseth him, with congressional sanction at least. The court below held this sanction is constitutional, which is clearly error. Imposed by the Constitution as a public right and benefit, the duty of service is beyond congressional power to absolve. Moreover, the judge cannot cede or trade

it for a congressional consideration. The law is not a "specific aspect or consideration" of salaries of "retired" judges, operating as an implied exception of said judges from the new salary law. Salaries were not an objective of the "retirement" law. They then existed as the creation of the old salary law, and continuance and duration were guaranteed by the Constitution. Hence, the "retirement" law is not a "fixing" of salaries, nor a restrictive "condition" offered and accepted by "retirement," as held by the court below (R. 4-5). So far as effect upon salaries is concerned, the words that "retirement" will be "upon the salary of which he is then in receipt," are useless, futile surplusage. Congress has no power over a judge's salary but to increase it. The presumption is, even if sometime violent, that Congress knows the limits of its power and means to keep within them. The purpose of the above words anent salary was not to create or fix or continue or restrict salaries theretofore created and in continuance, but to dispel doubts as explained in 2 of the Summary of Argument, *supra*, pp. 11-12. The said words could serve no other purpose. With or without them, the law is the same, viz.: "may retire from regular active service on the bench, subject to any future legislation."

Intermediate "retirement" and the new salary law, if the judge was constrained to sue for his salary he would perforce count upon the old salary law, because it and not the retirement law established or "fixed" his salary. And if no constitutional guarantee and the new salary law reduced salaries, would the "retirement" law protect him? Clearly not. Therefore, it is clear the "retirement" law is not a "specific aspect or consideration" of salaries of retired judges as held by the court below, and so does not serve to invoke the principle by the court applied to impose an implied exception to exclude "retired" judges from the new salary law and its grant of increased salaries.

The objective of the "retirement" law is appointment of additional judges, by "retirement" of the elder to open the door to the younger, and the objective of the new salary law is increased salaries to meet the rising tide of prices and costs and to induce the abler of the bar to enter judicial service. They are not in conflict. They stand together, each operative in its own domain, and without necessity that the former should be repealed by the latter if "retired" judges are to be included in the latter's scope and grant. The court below held otherwise, and erroneously. The retirement law is merely this: The judge declares he retires, thereupon the President appoints another judge to share the work or service, and thereafter if the "retired" judge chooses to refrain from regular active service on the bench and also wholly evade his duty, Congress agrees it will ignore his default.

This is the totality of its legal effect, and it affords no basis for the implied exception found by the court below.

Defense Below, Naval Cases

Fulmer v. *U. S.*, 32 Ct. Claims 112, relied upon by the defense in the Court below, may be by it cited here. If so, note it is radically different from the case at bar. The naval position involved is more an employment than an office. Be that as it may, Congress has plenary power to fix, reduce, or deny pay, to hire and fire, suspend, retire, demote, or remove the incumbent, and to abolish the position. The incumbent retired is without authority or power to function, is inactive and in effect is an ex-officer in all but label. Like Othello, his occupation's gone. The retirement statute could and did fix his pay and another statute prohibited any increase. Were he forced to sue for his pay, he would perforce count on the retirement law and not on the general pay law. His retirement was actual.

Now look you, none, *none* of these particulars of the status of a retired naval officer has a parallel in the status of a judge of the privilege. Of course the *retired* naval officer is not within a statute increasing the salaries of *officers*. The court's opinion that he is not is right, whether or not the reasoning and reason be likewise.

Constitution, Article 3, Section 1

The Constitution provides for courts and judges to serve the interests, rights and benefit of the public. By it in that behalf is imposed a duty to perform judicial service "as far as his age and health permit," upon every judge, a duty created by the Constitution and not by Congress. It goes without saying that rights conferred and duties imposed by the Constitution are beyond congressional power to impair. None such is granted it by the Constitution. Congress may lighten judicial labor only (1) by diminishing the jurisdiction of the Court, and (2) by creating another judge to share the work. And this latter was the object and the *legal* effect of the "retirement" law.

In either case the labor is lessened, but the duty of the judge is not diminished. Moreover, the duty can not be the subject of barter.

If congressional sanction of leisure is a condition and offer, acceptance of which by "retirement" deprives the public of its right and absolves the judge of or from his duty, as held by the Court below, it is unconstitutional and void.

"Public office is a public trust," and not an employment subject to contract, conditions, offer and acceptance, barter and trade. If the condition, offer, acceptance and agreement of "retirement" rise to this bad eminence, they are void and serve not as an implied exception of "retired" judges and petitioner from the new salary law. The condition fails, though in all else the law may stand.

Disimissal and Judgment

Nothing needs be added to the foregoing argument to demonstrate that the court below erred in dismissing the suit and entering judgment for defendant.

Conclusion

In the last analysis the case can be summed up in an irrefutable syllogism, as follows: First, the new salary law directs that "to each of the judges of the several district courts" shall be paid a salary "at the rate of $15,000 per year." Second, plaintiff is a judge of one of said courts. Ergo, plaintiff is entitled to be paid at the rate of $15,000 per year. He is entitled to judgment. That is the whole matter, the Alpha and the Omega, the law and the prophets.

Respectfully submitted,

GEORGE M. BOURQUIN,
In pro per.

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